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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 866

TWISP MINING & SMELTING COMPANY, A CORPORATION,

Petitioner,

vs.

CHELAN MINING COMPANY, A CORPORATION; SEATTLE-FIRST NATIONAL BANK, ACTING THROUGH ITS SPOKANE & EASTERN BRANCH, AS RECEIVER FOR THE ALDER GROUP MINING & SMELTING COMPANY, A DEFUNCT CORPORATION; AND METHOW GOLD CORPORATION, A CORPORATION,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

Comes now the Appellant, Twisp Mining & Smelting Company, out of abundance of caution, under the provisions of Section 237 (c) of the Judicial Code of the United States and moves this Honorable Court in the event that this Honorable Court takes the position that appellant's appeal was improvidently allowed by the Chief Justice of the State Supreme Court on November 20th, 1944, to treat the papers whereon the appeal was allowed by the State Supreme Court as a petition for certiorari and as if presented

to this Court at the time they were presented to the Judge who allowed the appeal on the grounds and for the following reasons, to-wit:

The final order or judgment of the State Supreme Court was entered on July 21, 1944 and the order denying the Petition for a rehearing was entered on August 29, 1944, and the Chief Justice of the State Supreme Court entered an order allowing the appeal of this cause to the United States Supreme Court on November 20th, 1944 (R. 1, p. 24).

Thereafter and on November 21, 1944, the appellant duly caused to be served on each of the Respondents a copy of an order of the Chief Justice of the State Supreme Court of date of November 20th, 1944, which was made pursuant to Rule 10, para. 2 of the Rules of the Supreme Court of the United States, which provides:

> "On consideration of the above request of Appellant, and good cause therefor in this particular case having appeared why this Order should be made, *It is now here ordered,* that the Clerk of the State Supreme Court shall certify separately to Honorable Charles Elmore Cropley, Clerk of the United States Supreme Court at Washington D. C., the *'Original Transcript'* of the pleadings in this cause in the Superior Court of Okanogan County, State of Washington, and the *'Original Statement of Facts'* in the same cause, and the following *'Original Exhibit's*— Nos. 4, 7, 10, 11, 12, 15, 20, 21, 21A, 24, 26, 44 and 57, all of which are now on file with the Clerk of the State Supreme Court, so that the same may be referred to if deemed necessary to verify the reference made by Appellant in the narrative form Record; Statement as to Jurisdiction and Briefs on appeal or statement in opposition to such jurisdiction if made, and also be available for the use of the United States Supreme Court or any Justice thereof, who may desire to inspect them for any purpose whatsoever." (R. pp. 1 & 2) (Italics ours).

And at the same time the Appellant duly caused each of the Appellees to be served with a copy of the Appellant's proposed parts of the records of the State Supreme Court that Appellant deemed material for a review of the questions raised and involved on the appeal to the Supreme Court of United States that was lodged with the Clerk of the State Supreme Court (R. 1, pp. 1 to 40 and R. 2, pp. 1 to 25); including Appellant's Petition for Appeal; Assignments of Errors; and Prayer for reversal; Order allowing the appeal; Citation on Appeal, and Notice to the Appellees of the lodgment of same with the Clerk of the State Supreme Court, and also Notice of the provisions of Rule 12, Page 3, of the Rules of the Supreme Court of the United States; and also duly served a copy of the Appellant's Statement as to Jurisdiction of the Supreme Court of the United States of this appeal on each of the appellees, and a written acceptance of same appears in the Record on appeal (R. 2. pp. 46, 47, 48).

None of the appellees made any objections to the appellant's proposed narrative form record on appeal; none of them served or filed any praecipe with the Clerk of the State Supreme Court for any additional parts of the State Supreme Court's record; none of them served or filed with the clerk of the State Supreme Court any typewritten or printed statement disclosing any matter or ground against the jurisdiction of the Supreme Court of the United States of Appellant's appeal and none of them ever served or filed any motion to dismiss the appeal and each of the Appellees were duly served with written notice of the settlement of the record on appeal by the Chief Justice of the State Supreme Court on or before January 3rd, 1945, and written acknowledgment of service appears thereon, and none of them appeared or made any objection in person or in writing to the certification of the Appellant's narrative form, proposed transcript on appeal and the Chief Justice

of the State Supreme Court duly certified same as the official transcript on the appeal on January —, 1945 (Tr. 2, pp. 50, 51).

This present application under the provisions of 237(c) of the Judicial Code of the United States, in the event that this Honorable United States Supreme Court should deem the Appellant's appeal was improvidently allowed by the Chief Justice of the State Supreme Court is based, on the grounds that the Judgment and Decree of the Superior Court of Okanogan County, State of Washington and the affirmance thereof by the State Supreme Court was the result of a deliberately planned and carefully executed scheme to defraud the Trial Court and the State Supreme Court and the Twisp Mining & Smelting Company by the knowing use of perjured testimony and fraudulent representations to fraudulently obstruct and defeat the due administration of justice in the manner indisputably to be shown herein which involves far more than an injury to a single litigant, for it was the perpetration of a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

The record in this case, shows by Exhibits 24 and 26 (St. 157), coupled with Robert H. Strong's testimony (St. 151), that Robert H. Strong and his associates entered into a deliberately planned scheme to illegally obtain the assets of the Twisp Mining & Smelting Company and on the trial testified, as follows:

> "Q. I will ask you to refresh your recollection from Exhibit #26 with their endorsements on there, does it not give you the authority to organize the Chelan Mining Company or any company you wished, on such terms as you desired? A. This reads, "In the memorandum which the four of us entered into under date of November 17, 1933, it was set out in paragraph 2

that we were to obtain a new contract satisfactory to the four of us, from the Twisp Company." And then I go on and say: "If agreeable to you I think it would be wise to mutually agree that I am at liberty to enter into any arrangement with the Twisp Co., either in the form of a contract or by transfer or exchange of stock, between a new company and the Twisp Company, if the same is done in the interest of all four of us and otherwise in accordance with the spirit of the contract." "That is my letter. I didn't read it completely." (St. 151). The part of that letter that Mr. Strong failed to read, is as follows:

"As things are developing now it is probably that we will not ask for any contract from the Twisp Co., but rather a transfer of the property to a new corporation that will be formed."

And in this connection, Mr. James O. Cull, testified: "Mr. Strong was going to organize a Washington corporation, and would want a representative trustee in Washington" (St. 32). "I (Mr. Cull) knew at all times, on January 29, and on January 30, when the last meeting was held, and on the 17th, when the first Twisp meeting was held, that I was to be a local director in Washington of the Chelan Mining Company. That had been understood and arranged that I was to act as a director of the Chelan" (St. 35).

In other words, Mr. Strong as above stated, had arranged with Mr. Cull the "Attorney" for the Twisp Company to illegally obtain all the assets of the Twisp Company for the Chelan Mining Company and for such services Mr. Cull was named as one of the Board of Directors in the articles of incorporation on January 26th, 1934 and elected as one of the Assistant Secretaries and local agent of the Chelan Mining Company on January 29, 1934, (St. 86) and from that date James O. Cull by his own act ceased to be the bonified "Attorney" for the Twisp Mining & Smelting Company.

Section 3803-31, Para. 1, of Remington's Revised Statutes (Sup.), of the Uniform Business Corporation Act of 1933, went into full force and effect on January 1, 1934, and so far as material expressly provided:

> "A director shall hold office for the term for which he was named or elected and until his successor is elected and qualified."

And the Twisp Mining & Smelting Company's By-Laws, Article 11, Section 1, provided:

> "• • • The trustees shall act only as a board, and the individual trustee shall have no power as such." "And shall hold office for one year and until their successors are elected and qualified."

And Section 5, of Article 11, provides:

> "Special meetings of the Board of Trustees shall be held whevever called by the president, or by one-third of the trustees for the time being in office. The secretary shall give notice of each special meeting by mail, • • •, to each trustee; • • •."

The "Written Opinion" of the State Supreme Court, which appears in the *Twisp Mining & Smelting Company* v. *Chelan Mining Company, et al*, 16 Wash. (2d) 264, 289, 290, 133 Pac. (2d) 300, 311, shows that the "Writer" of that opinion, claimed that:

> "The meetings of January 17 and 30, 1934, were regularly called special meetings. The directors met as a board, and a quorum of the directors then in office being present, proceeded to transact the business of the corporation, referred to in the notice given of such meeting."

However, the record shows, that James O. Cull, who had sold out to the Chelan Mining Company which was to be

formed, and who knew he was to be one of the Assistant Secretaries of the Chelan Mining Company, testified on the trial of the case in the Superior Court, as follows:

> "Q. Will you (Mr. Cull) examine the preamble to the minutes of January 17, 1934, and state whether that was a regularly called meeting * * *? A. * * *. There was notice to the directors that we recognized, *except Roy K. Magney, who was absent* * * *. Mr. Simonds notice had been sent sent to him *but so far as a notice as required under the By-Laws to hold a meeting to act upon the questions then considered, it was not a regularly called meeting*" (St. 26). (Italics ours.)

On January 24, 1934, Mr. Cull wrote Roy K. Magney a letter, which was discovered on June 5, 1944, by accident, which informed Roy K. Magney:

> "We held an "*Informal Meeting*" here on the 17th and adopted a resolution in form as per copy herewith. I told Mr. Strong, who was here at the time, that we would call and hold a regular meeting of the trustees, informing him that there are only five active Trustees at the present time, to-wit, you and Sawbridge and Coons and Hull and Simonds; there being two vacancies on the Board which resulted in 1932 when Hottel and Julian resigned and we elected Goetz and his friend, MacDonald of Seattle. Neither of them ever qualified by taking the oath of office, * * *."

But the statute law just quoted, provides that Hottel and Julian being duly elected and qualified Trustees, before they resigned, remained as trustees until their successors were duly elected and qualified, and therefore as a matter of law there were no vacancies on the Board of Seven Trustees of the Twisp Mining & Smelting Company during the month of January, 1934, as falsely claimed by Mr. Cull and wrongfully adopted by the "Writer" of the opinion in face of the undisputable fact that Mr. Strong, and his attorney,

Mr. Cole, and Mr. Cull were present at that "Informal Meeting" of date of January 17th, 1934, and Mr. Cull testified on the trial as follows:

> "I didn't send out formal notices for the January 17th meeting" (St. 52) Mr. Simonds notice had been sent to him but so far as a notice as required under the By-Law to hold a meeting to act upon the questions considered, it was not a regularly called meeting. We (Mr. Strong, Mr. Cole and Mr. Cull) decided to give notice and hold a meeting later" (St. 26).

And it is positive, that the "Writer" of the Opinion, never found any evidence in the record, to support his contention that the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company of date of January 17th, 1934 was a regularly called special meeting or even a legal meeting in any sense of the word.

Mr. James O. Cull, in order to deceive the Trial Court and the Supreme Court of the State of Washington, after admitting that he had mailed no "Notice" to any of the "Trustees" of the Board of Seven Trustees, or the Board of Five Trustees, of the Twisp Mining & Smelting Company for the holding of a special meeting of the Board of Trustees for January 17, 1934, and having knowledge of the provisions of Section 3803-31, Para. 2 of Remington's Revised Statutes (Sup.) of the Uniform business Corporation Act and of the provisions of Article 11, section 1, of the By-Laws of the Twisp Company which positively provided that Mr. Hottel and Mr. Julian, who were the duly elected and qualified members of the Board of Seven Trustees of the Twisp Company, on August 15, 1932, were still members of the Board of Seven Trustees until their successors were duly elected and qualified and therefore even if James O. Cull claimed that Mr. Goetz and Mr. MacDonald never qualified by taking the oath as a Trustee, still

as a matter of law Mr. Hottel and Mr. Julian office as Trustees was never vacant and James O. Cull, as an attorney, was charged with that fact and his purported position that there were two vacancies on the Board of Trustees of the Twisp Company during the month of January, 1934, was absolutely false and untrue and there never in fact or in law was any Board of Five Trustees in existence during the month of January, 1934.

Mr. Cull, however, testified on the trial in the Superior Court that Mr. Robert H. Strong, and his Attorney James Cole were present at the "Informal Meeting" of three of the trustees of the Board of Seven Trustees" (St. 26), and further testified:

"Q. At this meeting which was held January 17th, 1934, it was decided to call another meeting of the directors of the Twisp Mining & Smelting Company?

"A. Yes.

"Q. At whose suggestions was that meeting called?

"A. Mr. Cole, as attorney, at the direction of Mr. Strong, raised the question as to the sufficiency of the notice.

"Q. Was that the reason?

"A. That was the reason another meeting was called for the 30th and formal notices issued and sent out.

"Q. Was the notice of the meeting to be held January 30, 1934, sent out by you to each of these five directors?

"A. Yes." (St. 54.)

"Q. Attached to these minutes and proceedings contained in Exhibit #7, is a notice of the meeting and attached to the notice is a form of the Resolution to be adopted?

"A. Yes."

"Q. Did you mail a copy of that notice and resolution to each of those five men whom you just mentioned as constituting the Board at that time?

"A. Yes, I did.

"Q. And did you mail this notice to Roy K. Magney at the address which you had ascertained?

"A. Yes." (St. 184) And Mr. Cull further testified: "The trustees at that time were Mr. Simonds, Mr. Sawbridge, Mr. Coons and Mr. Hull and Roy K. Magney." (St. 183)

Mr. Cull, further testified that he drafted the purported minutes of the purported special meeting of the Board of Trustees of the Twisp Company of date of January 30th, 1934, and also testified that it was Mr. Cole, one of the Assistant Secretaries of the Chelan Mining Company that suggested that Mr. Cull call a second special meeting of the Board of Trustees in violation of Article 11, Section 5, of the By-Laws, which provides that such a notice of any special meeting of the Board of Trustees shall be mailed by the "Secretary" and Harold Simonds was the "Secretary" and available. Mr. Cull, as shown from the purported minutes that he prepared of the purported special meeting of the Board of Trustees of date on January 30th, 1934, which were never approved by any Trustee that was present, or any officer of the Twisp Company, falsely states:

"Yakima, Washington,
"January 30, 1934.

"A special meeting of the Board of Trustees of Twisp Mining & Smelting Company, a Washington corporation, was held at Room 208 Holtzinger Building in the City of Yakima, Washington, on the above date * * * pursuant to notice duly given by the President, copy of which is inserted in the Minute Records preceding the Minutes of this meeting. The Trustees present were John C. Sawbridge, C. M. Hull and W. V. Coons, *being the majority of the Board of Trustees as now existing.* Absent, Trustee Harold Simonds, *who had executed written consent to the Trustees meeting of January 17, of which this meeting is an adjournment* * * *. Absent, Trustee, Roy K. Magney, to whom notice of this meeting was mailed as shown by the affi-

davit of mailing notices of the meeting heretofore inserted in the Minute Records of the Company."

That purported affidavit, of date of January 30, 1934, falsely states:

> "That, on the 19th day of January, 1934, on behalf of and at the request of John C. Sawbridge, President of said Company, I mailed to each trustee, respectfully, * * *, a notice of special meeting of the Trustees, to be held on January 30, 1934, * * *." But that purported affidavit was merely signed by James O. Cull, but never acknowledged before any Notary Public." (See purported Minutes for proof of that fact in Exhibit #7, now available to this Court.)

The "Writer" of the Opinion of the State Supreme Court, at page 279, of the Opinion as found in 16 Wash. (2d) 264, 133 Pac. (2d) 300, 307, based his decision on James O. Cull's false statements by saying:

> "A notice of the meeting of January 30, 1934, signed by John C. Sawbridge, as president, dated January 19, 1934, to which was attached a copy of the resolution passed at the January 17th meeting, was mailed to each of the five directors, at his last known address, on January 19, 1934, as appears from the affidavit of James O. Cull."

John C. Sawbridge, swore to an affidavit on April 15, 1944, which is set out in full in the Petition to the State Supreme Court for relief, on pages 16, 17 and 18, that is attached to the Record on Appeal to this court, in which he swears:

> "Affiant further states that he never signed any Notice for the call of a special meeting of the Board of Trustees for the 30th of January, 1934, and never authorized James O. Cull to mail any Notices to anyone for said meeting and affiant further states that nothing was brought up at that meeting of January 30th, 1934 about

John Goetz or Frederick C. MacDonald not qualifying and the purported minutes of that meeting, as inserted in Exhibit No. 7, were never approved by this affiant and the name 'John Sawbridge' that appears on the certified copy of those minutes, on Exhibit #10, is not the signature of this affiant * * *."

And in same Petition, there is another affidavit of John L. Magney, to the effect that the "Original letter of James O. Cull of date of January 24, 1934, to Roy K. Magney, was found—by him on June 5, 1944, and that a true copy of said letter was inserted in said Petition on page 6, which shows that James O. Cull admits that the purported special meeting of the Board of Trustees of the Twisp Company of date of January 17, 1934, was merely an "Informal Meeting" and there is no mention made in said letter about the holding of a special meeting of the Board of Trustees for January 30th, 1934, and there never was any "Original Notice" signed by John C. Sawbridge and there being no "Original" there could not as a matter of law have been any legal copy mailed to Roy K. Magney as James O. Cull falsely claims there was and Roy K. Magney being one of the recognized "Trustees" of the Board of Trustees of the Twisp Mining and Smelting Company having been given no notice of the holding of the purported special meeting of the Board of Trustees and not being present there was no legal meeting held on January 30th, 1934, and no legal resolution of any kind or for any legal purpose whatsoever was ever passed at that manifest "Informal Gathering of Three of the Trustees" on the Board of Trustees on January 30th, 1934, whether it was a Board of Five Trustees or a Board of Seven Trustees and as a matter of law under such a state of affairs neither John C. Sawbridge nor James O. Cull were ever given any legal authorization or legal authority to execute that purported quit claim deed of date of January 31, 1934, Exhibit #20 herein, made in the name of the

Twisp Mining & Smelting Company, by persons who were never legally authorized to do so and said "Deed" under the provisions of Section 2586 of Remington's Revised Statutes of the State of Washington was and is a *"Forged Quit Claim Deed."* The Respondents knew that fact and none of them had any legitimate defense to that undisputable fact.

There is an affidavit in the "Petition" for relief to the State Supreme Court of W. B. Mitchell, a stockholder in the Twisp Company, now made a part of the Record on appeal to this Court, which shows:

> "That (W. B. Mitchell) affiant duly served a Brief of the Twisp Company in support of the Twisp Company's Motion to re-open the case and for a reconsideration of the court's Memorandum decision of February 5, 1942, on Counsel for the Receiver, and Counsel for the Chelan Mining Company and the Counsel for the Methow Gold Corporation and obtained each of said counsels written acceptance of service of said brief and on page 8 of said brief the following appears: "Therefore, as a matter of law, there being no legal meeting of the Board of Seven Trustees, by reason of the facts that no notice was given all the trustees that such a meeting was to be held or such action was to be taken, and no consent to hold a special meeting from all the trustees, * * *, the so-called 'Quit Claim Deed', wherein the Twisp Mining & Smelting Company, a corporation is vendor, and Robert H. Strong, is vendee of date of January 31st, 1934, is absolutely void because its execution was never effectively authorized by the Board of Trustees of the Plaintiff's corporation, in whom was vested the sole power to give such authorization. And that *void Quit Claim Deed,* under such a state of fact, constitutes a forged quit claim deed under the provisions of Section 2586 of Rem. Rev. Stat., which expressly provides: 'The false making or forging of any instrument or writing purporting to have been issued by

> or in behalf of a corporation or association, * * * and bearing the pretended signature of any person therein falsely indicated as an agent or officer of such corporation, association, * * *, is forgery in the same decree as if that person were in truth such officer or agent of such corporation, * * *."

The Receiver, however, knowing that fact and knowing there could be no defense made to a *"Forged Deed"*, with an intent to obstruct the due administration of justice to the Twisp Company, sanctioned its counsel to falsely maintain before the State Supreme Court, as follows:

> "In view of the very peculiar position taken by the substituted counsel for the appellant in their opening brief in injecting the suggestion about a 'forged deed', It may be proper to point out that, up to the time that brief was served, there had never been a charge of fraud, misconduct or any intentional improper act on the part of any trustee or officer of the Twisp Mining & Smelting Company, or on behalf of any other party to the litigation. The complaint, both as original and as amended, contained no charge of fraud and the record is equally silent. The complaint was drawn and the case tried solely on the theory that the lack of a quorum rendered the proceedings void as a matter of law. Certainly the Court will not permit the injection of any such claim into this case on appeal." (Brief p. 8)

And the Methow Gold Corporation by its counsel joined with the Receiver and falsely claimed to accomplish the same legal end, as follows:

> "In reply to the charge of forgery set forth in the briefs submitted by appellant, we are prone to believe that this is the brain child of W. B. Mitchell, the clerk employed by Attorney W. G. Boland. There is * * * no argument about forgery before the trial court. Consequently, Judge Brown, the trial

judge, would be surprised to learn that there was an allegation of forgery in this case." (Brief p. 28)

In the first place, the trial judge, stated in his Memorandum of January 7, 1941, that the plaintiff's cause of action was based on illegal acts of the Chelan Mining Company saying:

> "This being the situation I must look upon the complaint as being a single purpose effect to set up the invalidity in the conveyance on the sole grounds *that it was consummated without authority and was not binding on the Twisp Mining & Smelting Company,* the plaintiff herein, and that all the allegations in the complaint to the effect that the officers and agents of the Chelan Mining Company aided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpetrations, are to be taken and considered merely for the purpose of showing that the Chelan Mining Company had notice all along of the invalidity and unwholly character of the color of title which is acquired." (St. 341)

These respondents, then, as above shown, deliberately and intentionally mislead the "Writer" of the State Supreme Court's Opinion, who manifestly accepted their false statements as true and thereby committed a reversible error in holding the false statements of those two respondents as true and by reason of that situation based the following ruling on a false premise, to-wit:

> "It may be stated that this case was not presented to this court by the same counsel who tried the case for appellant, and we assume that the briefs were not prepared by counsel who tried the case. We make this statement for the reason that counsel on behalf of the appellant in this court makes some claim that the deed executed on behalf of appellant on January 31, 1934, was a forgery. No such claim or contention was made in the lower court; in fact no contention was

made in the lower court that the then directors of appellant, or Strong, or the Chelan Mining Company, acted other than in good faith. The case was tried by appellant purely upon the theory that there was no quorum of the directors present on January 17, or January 30, 1934, authorized to pass the resolution, and that therefore, the resolution passed on January 17, and adopted on January 30, was null and void, and the deed executed pursuant to such resolution was also null and void. *We therefore cannot consider the claim* now made in this court that the deed was a forgery." (Supreme Court's opinion, page 270)

It is very apparent, that the "Judge" who writes the "opinion" is the only Judge that reads the Record, in the State Supreme Court, for the obvious reason that the "Writer" of the Opinion has based his opinion of the "Forged Deed" on the false statements of "Counsel" for two of the "Respondents" that were before the State Supreme Court. In order to illustrate this important point, we will quote the law governing the situation, as stated in *Hutchinson Realty Co.* v. *Hutchinson,* 136 Wash. 184, 239 Pac. 388:

"This action was commenced in the Superior Court by the plaintiff, Hutchinson Realty Company, against the defendant, Josephine Hutchison, seeking recovery of certain real property and the quieting of its title thereto by the removal of clouds thereon in the form of deeds of conveyances purporting to have been executed wholly without consideration moving to it *and wholly without authority of its President so pretending* to execute them, all of which was well known to her at the time of receiving the deeds." Deeds were held to be void.

To the same effect is the case entitled *Hotaling* v. *Hotaling* (Cal), 224 Pac. 435, where the court held:

"The trial court held that the deed was void and the appellate court affirmed the trial court's ruling, and

in doing so used this language: * * * 'the deed under which Richard M. Hotaling claims as an attempted corporate act, it must, we think, be conceded to have been invalid from its inception for the reason that its execution was never effectively authorized by the Board of Directors in whom was vested the sole power to give such authority.' "

In *Almo Trust Co.*, (Tex.), 203 S. W. 413, 414, was a case were it failed to recite a lien on the land, was a forgery and that the real deed recited a vendor's lien to secure the purchase money, and retaining the superior title to W. C. Scott and wife in the land and the court held:

"The forged deed could not affect the title to the land, and was therefore not entitled to record. The provisions of the statutes as to deeds being void as to subsequent purchasers, without notice, if not recorded, have no application to forged deeds. Reliance on a recorded forged deed may bring loss on him who so relied, but it cannot affect the rights of the owner of the property. A man cannot be deprived of his property by a forged deed, no matter in what good faith the party acted who claims under it. The forged instrument is as absolute void and ineffective as though it had never existed. * * *. When the deed that was recorded in Cameron County which purports to be the deed of W. C. Scott and wife was attacked by an affidavit of forgery, the burden rested upon the appellant to show that it was a genuine instrument."

The act of forging a deed or other instrument is an illegal act, and *Colby* v. *Title Insurance & Trust Company* (Cal.), 117 Pac., 915, 918, in passing upon the validity of a deed that was obtained by an illegal act, held:

"The doctrine of estoppel by conduct or by latches or even ratification, has no application to a contract or other instrument which is void, because it violates an express mandate of the law and dictates of public policy. Such a contract or instrument had no existence

whatever for any purpose, and neither action or inaction of the parties to it can validate it; and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity."

In *Lewis* v. *Kuyawa*, 158 Wash. 607, 617, 291 Pac. 1105, the Court likewise held on the subject of a forged deed, as follows:

> "It is unquestionable the general rule that one holding under a forged instrument, however ignorent he may be of the forgery or how musch of value he may have parted with in reliance on the genuineness of the instrument, *cannot claim protection against the title of the rightful owner.* As some courts have said, it would be a monstros doctrine to hold one, by forging a deed of his neighbor to himself could in any way affect the title of his neighbor."

In *Kline* v. *Mueller* (Okl.) 276 Pac. 200, 206, the court held:

> "A forged deed is void, and the same, though recorded in due form is ineffective as a muniment of title, even as to subsequent purchasers in good faith without notice."

In *Abee* v. *Garges* (Tex.), 65 S. W. 489, the court held:

> "The — in a quitclaim deed, even though for value and without notice, takes the risk of the genuineness of each and every deed in the line of the grantor's title."

In *State* v. *Fay* (Minn.), 83 N. W. 158, 159, the court held:

> "A 'Check' was signed 'P. McDonald, by John McDonald' and was held to be a forgery. The writing alleged to be forged purports on its face to have been executed by P. McDonald by John McDonald. Hence it appears on the face of the instrument that, if it was genuine, it would possess legal efficacy as an order of

P. McDonald for the payment of money. *Therefore a representation that the instrument was genuine includes the representation that John McDonald was authorized to execute it for P. McDonald.* Now, when the defendant uttered the instrument as true, knowing it to be forged, he thereby represented and affirmed that agent purporting to execute it for his principal had authority to do so. He is bound by his own representations, and it is not necessary to allege in the indictment or prove on the trial such agency. Were it otherwise, all the party putting off the forged paper needs to do in order to escape conviction would be to deal in such paper only as purported on its face to be executed by an agent for his principal, but who had no authority to represent the principal in any way." And this case is again confirmed by the case entitled *Commonwealth* v. *Wilson* (Ky.), 12 S. W. 264, where the court held:

"• • • For not only was the plat certificate, as charged fraudulent, but, though made by the accused person, purporting to be not his individual, but official, act as surveyor, wherein the writing was false and deceptive, and whereby only would it have possessed legal efficiency if genuine and authentic. • • •"

Since, even the Trial Judge, states in his Memorandum of date of January 7, 1941, to-wit:

"It is plain from the allegations of the complaint • • • that the plaintiff is seeking to stand squarely on the proposition that the actions of the trustees of the plaintiff in January, 1934 were wholly without authority and therefore did not bind the plaintiff corporation, and that the illegal character of the performance was known to the officers and agents of the Chelan Mining Company,—in fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in, and were accessories in those unlawful and illegal proceedings carried on in January, 1934." (St. 341.)

And it is now distinctly shown that the "Question of the Forged Deed" was raised in the Superior Court before the Trial Judge, and that counsels for the respondents in the State Supreme Court knew that fact and deliberately made false statements to pervert justice to the Twisp Mining & Smelting Company, they were tampering with the administration of justice in such a manner that it was a wrong against the institutions set up to protect consistently the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society, and since it was their own false written statements that caused the State Supreme Court to refuse to pass on one of the vital issues on that appeal to the State Supreme Court these appellees cannot lawfully be allowed to deprive the Twisp Mining & Smelting Company of its property and property rights by virtue of a "FORGED QUIT CLAIM DEED" under the authority of *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 88 U. S. Law Ed Advance Opinions, 1944, at pages 936 and the case following it in that same advance sheet that were decided on May 15, 1944.

In *Powell* v. *Alabama*, 287 U. S. 45, 68-69, 53 S. Ct. 55, 77 Law Ed 158, 84 A. L. R. 527, the court held:

> "It has never been doubted by this court or any other so far as we know that notice and hearing are preliminary steps to the passage of an enforceable judgment, and that they, together with a legal competent tribunal having jurisdiction of the case, constitutes basic elements of the constitutional requirements of due process of law. The words of Webster, so often quoted, that by *"the law of the land"* is intended *"a law which hears before it condemns,"* has been repeated in various forms of expression in a multitude of decisions. * * *. "Judgments without such citation and opportunity to be heard wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administrated."

James O. Cull's Testimony Was False

It must be remembered that James O. Cull sold out to Robert H. Strong prior to the January 17th, 1934, purported "Informal Meeting" of three of the Board of Seven Trustees of the Twisp Company, for an agreed consideration with Mr. Strong, that when the Chelan Mining Company was incorporated he was to be named in the Articles of Incorporation as one of the Directors of the Board of Directors of the Chelan Mining Company, and later elected as one of its "Assistant Secretaries and local agent in the State of Washington." (St. 32) Robert H. Strong and his attorney James Cole were present at that purported "Informal Meeting" or "Informal Gathering" of three of the members of the Board of Seven Trustees that was held on January 17th, 1934. (St. 26) And James O. Cull testified under oath as follows:

> "I knew at all times, on January 29th, and on the 30th when the last meeting was held, and on the 17th when the first Twisp meeting was held, that I was to be a local director in Washington of the Chelan Mining Company. That had been understood and arranged that I was to act as a director of the Chelan." (St. 35) And there and then James O. Cull ceased to be the bona fide attorney of the Twisp Company.

Mr. Cull, Mr. Strong and Mr. Cole knew that Section 3803-31, of Remington Revised Statutes, para. 1, (Sup.) of the Uniform Business Corporation Act of 1933, which went into full force and effect on January 1, 1934, provided:

> "That a director shall hold office for the term for which he was named or elected and until his successor is elected and qualified."

On August 15, 1932, John B. Hottel and Charles W. Julian, were two of the duly elected and qualified Trustees of the Board of Seven Trustees of the Twisp Company and Mr.

Cull, Mr. Strong and his attorney Mr. Cole knew those undisputable facts and also knew that no person had been elected and qualified as successors to either James B. Hottel or Charles W. Julian and knew then as a matter of law that John B. Hottel and Charles W. Julian position as Trustees was not vacant, and that John B. Hottel and Charles W. Julian still remained as the duly elected and qualified trustee of the Board of Seven Trustees of the Twisp Company during the month of January, 1934.

> Mr. Cull, testified as follows: "Q. I will ask you this: When was it discussed with you and anybody in connection with the Chelan Mining Company, that you were to be a trustee (should be director) named in the Articles, and that you were to be assistant secretary of the Chelan Mining Co.? A. It was discussed prior to the January meetings of the Twisp. As I remember, Mr. Strong, who was negotiating for the property, would organize a Washington corporation. Whether it was discussed there at the meeting of the 17th—I feel sure they were there because Mr. Cole was the party who raised the question of formal notice to Roy K. Magney—or whether the proposition had been discussed before that. Mr. Strong was going to organize a Washington corporation, and would want a representative trustee in Washington and as I recall it was discussed, as I say, at one of these informal meetings * * *." (St. 31, 32)

James O. Cull, being examined by Counsel for the Chelan Mining Company, testified on the trial of this cause in Okanogan County, State of Washington, that he was appointed by action of the Board of Five Trustees of the Twisp Company, as its Assistant Secretary on January 17th, 1934, and continued as such "Assistant Secretary" from that time up until the meeting of April 5, 1939. (St. 165, 166) He further testified that Exhibit #10, was a certified copy of the purported special meeting of the Board of Trustees of

date of January 30, 1934, which he prepared and swore that said Exhibit #10 was a true copy of the original, which he inserted in Exhibit #7, and on further questions of Counsel for the Chelan Mining Company he again falsely testified:

> "Q. Were you at that time Assistant Secretary of the Twisp Mining & Smelting Company? A. Yes, I had been so designated on the 17th." (St. 74)

However, the purported minutes that James O. Cull, prepared of that purported special meeting of the Board of Trustees, shows on its face that James O. Cull was not appointed as "Assistant Secretary", but merely acted as Secretary Pro Tem in the absence of the regular Secretary, Harold Simonds, and the purported minutes of the Board of Trustees of January 30th, 1934, were also prepared by James O. Cull and shows on its face that James O. Cull was elected merely as Secretary Pro Tem and further as already shown herein that there was no notice of the holding of either purported special meeting of January 17th, 1934 or January 30, 1934, ever given to Roy K. Magney, and Roy K. Magney was not present at either purported meetings and no legal appointment of James O. Cull, as Assistant Secretary could have been made and was in fact never made and James O. Cull's testimony to the contract was false and untrue.

James O. Cull, in his capacity of a "Director" and "Assistant Secretary" and Local agent of the Chelan Mining Company, falsely posing before Three members of the Board of Seven Trustees of the Twisp Company, at an "Informal Gathering" of those three trustees, prepared a purported set of minutes of what took place at that "Informal Gathering" and inserted same in Exhibit #7, without having them approved by any one, except himself as "Secretary Pro Tem" of the Twisp Company. He then prepared a purported certified copy of those purported

minutes that he placed in Exhibit #7, and certified it was a true and correct copy of the minutes of a special meeting of the Board of Trustees of the Twisp Mining & Smelting Company of date of January 30th, 1934, and falsely testified on the trial, as follows:

> "Q. I will ask you if Exhibit #10 is a certified copy of the minutes of that meeting which you sent to Mr. James Cole, attorney at Portland, at his request? A. Yes.
> Q. Were you at that time assistant secretary of the Twisp Mining & Smelting Company? A. Yes, I had been so appointed on the 17th." (St. 74)

The purported minutes of the "Informal Gathering" of three of the Trustees of the Board of Seven Trustees of the Twisp Company, that James O. Cull, prepared, which were never approved except by himself, shows that James O. Cull merely acted at that "Informal Gathering" as Secretary Pro Tem in the absence of the regular secretary, Harold Simonds.

The purported minutes that Mr. Cull prepared of a purported special meeting of the Board of Trustees for January 30th, 1934, recites as follows:

> "James O. Cull was elected as Secretary Pro Tem of the meeting and acted."

And further shows that James O. Cull, as "Secretary Pro Tem" moved the Three Trustees at that "Informal Gathering" to appoint himself as the Assistant Secretary, and prepared the resolution that he wanted to have those three trustees pass, which recites:

> "Now Therefore, Be It Resolved, that James O. Cull, of Yakima, Washington, who has heretofore acted, and is now acting, as attorney for the Twisp Mining & Smelting Company, shall be and is hereby appointed as Assistant Secretary of said Company, with full

power and authority to act in all matters pertaining to the Company business * * *."

That being an "Informal Gathering" of some of the Trustees of the Board of Trustees of the Twisp Company without notice to some of the trustees and without their presence no legal resolution could be passed and James O. Cull was not legally appointed as the "Assistant Secretary of the Twisp Company and when he signed that purported certificate for the certified copy of the purported minutes of the "Informal Gathering of Three Trustees" not as an individual, but falsely representing that he was the Assistant Secretary, he forged that instrument under the provisions of Section 2586 of Remington's Revised Statutes of the State of Washington and Mr. Cull further testified:

> "I see Mr. Sawbridge's signature is not on the original", nevertheless a false signature of John Sawbridge is placed on the purported certified copy that James O. Cull admits he prepared.

And James O. Cull, being a "Director", a "Assistant Secretary" and local agent of the Chelan Mining Company, who was acting for the Chelan Mining Company in this purported transaction knew he was never legally appointed as "Assistant Secretary" of the Twisp Company and the Chelan Mining Company was charged with the knowledge of Its agent in the course of his employment as Its agent to wrongfully procure all the assets of the Twisp Company for the Chelan Mining Company.

The Executory Sale Contract Was Never Cancelled

The Alder Group Mining & Smelting Company was the owner of three patented Mining Claims under a Land Patent from the United States of America, which was duly filed for record in the Auditor's Office of Okanogan County, State of Washington on February 16, 1939, and recorded

in Book "M" of Patents on page 97, which Patent was issued on May 13, 1912, and on November 23, 1927, said Alder Group Mining & Smelting Company, in its legal capacity of a "De Facto Corporation" entered into an "Executory Sale Contract" for the sale of those three patented mining claims and that "Executory Sale Contract" together with legal assignments thereof to the Twisp Mining & Smelting Company were duly filed for record with the Auditor of Okanogan County, State of Washington on June 27, 1932, and were duly recorded in Volume 9 of Miscellaneous Records on page 303 as notice to the world of the fact that the Twisp Mining & Smelting Company was the owner of that "Executory Sale Contract" and all the rights and privileges thereunder.

And one of the terms of said "Executory Sale Contract", "Exhibit #4", was:

> "The terms of this agreement shall apply to, be binding upon and inure to the benefit of the successors, grantees, and assigns of the respective parties hereto."

Volume 66 C. J. 1111, section 938m expressly provides:

> "Regardless, however, of the technical distinction made by some courts between constructive notice and implied notice, it is generally held that knowledge of such facts as ought to put a prudent man on inquiry as to the title charges subsequent purchasers with notice not only of those facts which are actually known, but also of all other facts which a reasonable investigation would have ascertained, providing the inquiry becomes a duty, and would lead to the knowledge of the required facts by the exercise of ordinary diligence and understanding." Citing Reynolds v. Mosely, 32 Fed. (2d) (8th C. C. A.) 979, where the court held:
>
> "The law is well settled that one cannot be deemed an innocent purchaser of an interest in real property, who buys with knowledge of an outstanding title or of out-

standing rights superior to his own; and knowledge of facts sufficient to put a reasonable prudent man upon inquiry, which if followed up with reasonable diligence, would lead to knowledge of such outstanding title or outstanding rights thereunder."

And *Kosten* v. *Inglis Fleming*, 17 Wash. (2d) 500, 136 P. (2d) 449, holds:

"A record title would be of small worth if a stranger to, or a one time holder of, the record could defeat it by deed or encumbrance it by lease or mortgage."

Mr. Gillespie, counsel and an officer of the Methow Gold Corporation, in order to falsely attempt to prove that said "Executory Sale Contract" had been cancelled caused Fred B. Morrill, to falsely testify on the trial of this cause, as follows:

"Mr. R. S. Lewis forwarded me this Contract (Exhibit #4) * * * requested me * * * to cancel the Magney contract, and I instituted proceedings and did cancel it, * * * I brought an action declaring to cancel this contract in the Superior Court of Spokane (County which was) filed August 24, 1932." (St. 250, 251) Exhibit #44, which was admitted in evidence. (St. 256)

Q. At the time you commenced this action, Mr. Morrill, did you ever hear or know that the Twisp Mining & Smelting Company had any interest or claimed to have any interest, or that the contract was ever assigned? A. I may have heard about the Twisp, I wouldn't be sure, but I know very well there was no record of anything of the Twisp or anything to show that they held it. That was not placed of record until a long time after the commencement of this action." (St. 257) "The Court: A long time after what? A. A long time after the commencement of this action." (St. 257)

The "Judge of the State Supreme Court" who wrote the opinion, based his opinion on Mr. Morrill's false testimony,

as stated above, and utterly ignored the proof of the undisputable fact that Mr. Morrill's testimony was false and untrue, as shown from Exhibit #44.

It is admitted then by Fred B. Morrill, on page 18, St. 56, that he brought the action to cancel that "Executory Sale Contract" of date of November 23, 1927, in the Superior Court of Spokane County, State of Washington and the Supreme Court of the State of Washington in *Miles* v. *Chinto Mining Co.*, Vol. 121, No. 24, Wash. Decisions 859, 860 of December 6, 1944, holds under section 204 of Rem. Rev. Stat., subd. 1:

> "That actions for the determination of all question affecting the title • • • to real property shall be commenced in the county in which the subject of the action is situated."

And the Supreme Court in that case held that because the action in the *Miles* case was not filed in the county where the mining property was located there could be no adjudication of anything in that action because the court had no jurisdiction to entertain the purported action and dismissed the action for that reason.

Exhibit #44, shows on its face, that it is alleged in the complaint,

> "That plaintiff, THE ALDER GROUP AND SMELTING COMPANY, is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal office in said State in the City of Spokane, Washington." *BUT NOWHERE AS IN SAID COMPLAINT WAS IT ALLEGED THAT IT HAD PAID ITS ANNUAL LICENSE FEE LAST DUE.* (Italics ours.)

And *National Grocery Co.* v. *Fur Trading Co.*, 3 Wash. (2d) 288, 100 Pac. (2d) 408, holds:

> "That under the provisions of section 3842 of R. R. S. (which was in force prior to 1932 under Remington's

Compiled Statutes). No corporation shall be permitted to commence or maintain any suit, action or proceedings in any court of this state, without alleging and proving it has paid its annual license fee last due."

And *Paterson* v. *Ford,* 167 Wash. 121, 8 Pac. (2d) 1006, holds that no judgment can lawfully be rendered against a person or corporation unless that person or corporation is made a party to the action, which was not done in that case, and the Twisp Mining & Smelting Company not being made a party to that action the court held in the *Patterson* case above, as follows:

"Appellant not being a party to the action, and not being brought in as such, * * *, the trial court had no such jurisdiction of it as to warrant the re-dition of any judgment or the making of any order divesting it or its record title to the real estate."

And by virtue of that holding, the said "Executory Sale Contract" of date of November 23, 1927, was never cancelled as a matter of law, and the "Writer" of the State Supreme Court manifestly failed to even examine the said Exhibit #44, and protect the Twisp Company's rights in the premises.

Mr. Gillespie further examined Mr. Morrill and caused him to testify as follows:

"Mr. Robert S. Lewis notified me (Mr. Morrill), that he and I were the only surviving trustees on or after June, 1938 and the new corporation had not been perfected; and the old corporation still stood. Then as I remember Mr. McCain and you (Gillespie), Mr. McCain had talked with me about this property before that time and knew about it, and I got hold of Mr. McCain and you, and you made a proposition to buy this property on bond and lease for $300,000.00 and that was drawn up and sent to Mr. Lewis and was not accepted but it terminated in this lease that you have now. * * *. Mr. Strong came there and you and

Mr. McCain and Mr. Strong had a meeting there in my office. (St. 260-261)

Mr. Gillispie: "Q. And the result of that was that they would transfer to you and to Robert S. Lewis—by "they" I mean the Chelan Mining Company—would transfer that to you (Fred B. Morrill and Robert S. Lewis) and you would issue the other? A. It worked out to be this lease that is in question—not a bond and lease, but a lease." (St. 261)

Joint Illegal Acts of the Chelan Mining Company, the Methow Gold Corporation and Robert S. Lewis and Fred B. Morrill, as Surviving Trustees to Engage in New Business in Behalf of the Alder Group Mining & Smelting Company to Attempt to Illegally Defeat the Executory Sale Contract Exhibit No. 4, Herein.

In *Bishop* v. *Averill*, 17 Wash. 209, 49 Pac. 1024, that practice was tried and the court in passing on the validity of such practice held:

> "The provisions by which time was made the essence (Of The Executory Sale Contract) were made for the benefit of the respondent (Vendor) and the right to enforce the contract belonged to the respondent (Vendor), but the evidence tended to show that during the lifetime of the contract, * * *, the respondent voluntarily entered into a new agreement, under which in disregard, as we think—of appellant's rights, the property was actually transferred to Kerr, and the old contract terminated. This termination resulted, not in consequent of the expiration of any of the provisions in it, but solely because of the new contract, which was made without appellant's consent."

In this instance, the Twisp Company was not in default, but the Chelan Mining Company, by Its President, Mr. Strong, and the Two Surviving Trustees, Robert S. Lewis and Fred B. Morrill, and the Methow Gold Corporation, by its counsel and officer unlawfully and illegally entered into

a contract on behalf of the Alder Group Mining & Smelting Company to engage in new business in behalf of the Alder Group Mining & Smelting Company, which they had no legal right to do, that contract was dated January 23, 1939, and consisted of a contract for a lease, as evidenced by Exhibit #11 & Exhibit #12, and the Methow Gold Corporation obtained an assignment of said purported lease from Charles W. Gillespie and Mahlon McCain the original lessees and the Methow Gold Corporation unlawfully took possession of the lands described in said lease and prevented the Twisp Company from fulfilling the terms of the "Executory Sale Contract" Exhibit #4.

The "Receiver" under oath admitted that the two surviving trustees, Robert S. Lewis and Fred B. Morrill, entered into an agreement of January 23, 1939, Exhibit #11, herein and pursuant to that agreement the Chelan Mining Company executed and delivered to said surviving trustees a conveyance of the real property described in the "Amended Complaint of the Twisp Company on January 17, 1939"; and further admits that the consideration for said contract and conveyance was furnished out of the proceeds derived by the Methow Gold Corporation from the sale of ore removed from the three patented mining claims mentioned and described in the "Executory Sale Contract" of date of November 23, 1927, Exhibit No. 4, herein (Tr. 42).

On account of the illegal acts of the Two Surviving Trustees, Robert S. Lewis and Fred B. Morrill, in attempting to engage in new business, W. E. Gamble, one of the stockholders of the Alder Group Mining & Smelting Company, started an action in the Superior Court of Spokane County, State of Washington, entitled *W. E. Gamble* v. *Alder Group Mining & Smelting Company* and Robert S. Lewis and Fred B. Morrill, surviving trustees, case No. 102961, of the Files and records of that action on February 3, 1939, seeking to have a statutory liquidating receiver appointed under

the statutory proceedings of Section 3803-53 of Remington's Revised Statutes (Sup.) of the Uniform Business Corporation Act of 1933, which went into full force and effect on January 1, 1934, and said Surviving Trustees appeared on behalf of the corporation and themselves and contested the appointment of the Statutory Liquidating Receiver on the grounds that they had entered into a 99-year lease of the property and the court held that said transaction covered by Exhibit #11 and Exhibit #12 of date of January 23, 1939, were absolutely null and void and entered an order on May 18, 1939, appointing the present Receiver, as a statutory liquidating Receiver of the Alder Group Mining & Smelting Company and a certified copy of those proceedings was introduced in evidence on the trial of this cause in the Superior Court of Okanogan County, State of Washington, under Exhibit #57.

Thereafter, Fred B. Morrill, filed a claim with the Receiver, for attorney fees for his services in procuring the Contract Exhibit #11 and Lease Exhibit #12, and the trial court denied his claim and on appeal to the Supreme Court in *Gamble* v. *Alder Group Mining & Smelting Company, Fred B. Morrill and Robert S. Lewis, defendants; Fred B. Morrill, Appellant* v. *Seattle-First National Bank, Spokane & Eastern Division, as Receiver, Respondent,* 5 Wash. (2d) 578, 105 Pac. (2d) 811, the court held:

> "From that portion of the order disallowing the claim for services rendered prior to the institution of the receivership action, this appeal is taken. * * *. In addition to making the lease above mentioned, the surviving directors had other transactions. *They, at no time prior to the beginning of the receivership action, attempted to wind up the affairs of the corporation or call any meeting of the stockholders.* * * * From the order appointing the receiver, no appeal was taken, and that order became final. * * *. The corporation being in the condition it was, unless authorized by

statute, of which we know of none in this state, had no power to transact new business. (Citing Authorities) Since it was the duty of the appellant and his associate director to refrain from engaging in new business, it would seem evident that the appellant (Mr. Morrill) would not be entitled to compensation for doing something which under the law, it was his duty not to do."

The Receiver Never Functioned as a Legal Receiver

23 R. C. L. 70 and 71, expressly provides:

"He should not advocate the cause of one claimant against another. Between them he is indifferent, owing a like duty to all, and for that reason should as far as possible, see to it that each has an equal opportunity to enforce his claim.

23 R. C. L. 74 and 75, further provides:

"There is a distinction between the power of a receiver to elect not to bind the receivership by existing executory contracts and his power to annul such contracts. He had no power to do any act which will impair the obligation of a binding contract so far as the parties are concerned."

In *Wapes* v. *Sergeant*, 120 Wash. 63, 206 Pac. 945, the court held:

"Facts briefly were: Sergeant held an executory sale contract for the purchase of standing timber and that executory sale contract was still in force, but for some reason there was a receiver appointed to take over the property and property rights of the 'Vendee' in said executory sale contract. The Court held: 'When the corporation was formed Sergeant undertook to assign to it this contract, and it (corporation) obtained just such rights in this property as the corporation had. If Sergeant was the owner of this contract, he would have the right until such times as a forfeiture had been

> properly declared, to cut the timber, saw it into lumber, sell it and pay $3.00 per thousand feet from the sale price to these appellants, until the whole of the balance had been paid. In our opinion, the receiver is not the unqualified owner of this property, and had no right to undertake to sell and convey an unencumbered, unconditional title to it."

In *Kennison* v. *Kanzler* (6th C. C. A.) 4 Fed. (2d) 315, the court held:

> "A receiver takes the property which goes into his hands in the same right and equities, and liens, as it stood in the hands of the person or corporation out of whose possession it is taken."

The "Present Receiver" ignored the undisputable fact, that the Twisp Company was the lawful owner of the "Executory Sale Contract"—Exhibit #4, as vendee, subject only to the payment of the purchase price, and had an absolute right to mine the ore on the premises, sell same and apply same on the purchase price until the full amount of the payments due on same had been paid.

In *Payne* v. *Ryan*, 183 Wash. 590, 49 Pac. (2d) 53, 56, holds:

> "The evidence shows that appellant, after the principal contract had been let, pursued a course of evasion with Williams, the manager for the respondent, urging to "forget about the written contract, and financial showing and be ready to get to work," negotiated with other contractors for lower prices for truck work and finally repudiated the contract with respondent. Hence, it was he who breached the oral contract, which had been entered into between the parties. * * * "It was appellant himself, who prevented performance of the conditions precedent by the respondent," and this court on appeal held: "The rule is clear and well settled, and founded in absolute justice, that no party

> can either prevent performance by another of any of its conditions, or, on the other hand disable himself from complying with any conditions, and derive any benefits or escape any liabilities."

And this "Statutory Liquidating Receiver" instead of doing its duty as by law prescribed, it never functioned as a "liquidating Receiver", but on the contrary at all times functioned as an usurper of power which it did not have as a matter of law. It illegally caused the Trial Court in the receivership action to exceed the statutory power and to pretend illegally to enter into an illegal contract with the Methow Gold Corporation on July 27, 1939, to commit willful trespass on the rights of the Twisp Company to mine the ore, sell same and make its payments on the "Executory Sale Contract" Exhibit #4, herein and by reason of that willful trespass there was more than $400,000.00 worth of mineral sold from said premises and confiscated by the Methow Gold Corporation with the exception of some $25,000.00, that the Receiver obtained from that illegal transaction and the stockholders of the Alder Group Mining & Smelting Company have been defrauded out of their contract price of the Executed Sale Contract of the sum approximated of some $300,000.00, and the Receiver's actions in this instant case is governed by the ruling in *Pittsburg & West Virginia Gas Co.* v. *Prentress Gas Co.* (W. Va.), 100 S. E. 296 7 A. L. R. 901.

This Court in *John Vallely, as Trustee* v. *Northern F. & M. Ins. Co.*, 254 U. S. 348, 65 Law Ed. 297, holds:

> "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void and that even prior to reversal."

And in *Ranson* v. *Williams*, 2 Wall. 313, 17 Law Ed. 803, this Court held:

> "The extent and nature of the power depends upon the terms in which it is conferred and it will not be enlarged because exercised by Courts clothed with general jurisdiction; and any judgment by a tribunal without authority or which exceeds or lies beyond its authority is necessarily void and may be shown to be so in collateral proceedings even though it be a court of general jurisdiction, because no authority derived by law can transcend the source from whence it came, and the principle that a limited authority must appear to have been strictly construed even when the acts of a Superior Court are in question is well settled." Also see Murry v. American Surety Co., 70 Fed. (9th C. C. A.) 341.

This motion therefore presents a case to this Honorable United States Supreme Court in which the undisputable evidence that reveals a deliberately planned and carefully executed scheme on the part of the Chelan Mining Company, Receiver and the Methow Gold Corporation and their officers to obstruct the due administration of the law to the Twisp Mining & Smelting Company and to illegally and deliberately obtain the approval of the Courts to their illegal confiscation of the property and property rights of the Twisp Mining & Smelting Company without any legal authorization or the payment of any real consideration therefor and we submit that it is therefore the duty of this Court to take jurisdiction of this case under the historic power of equity to relieve the Twisp Mining & Smelting Company from their fraudulently begotten judgments, that is to say, that it is the duty of this Court to vacate the order of the State Supreme Court that was entered on July 21, 1944, and direct the State Supreme Court to grant the Twisp Mining and Smelting Company permission to file its petition in the Superior Court of Okanogan County, State

of Washington for relief from the said fraudulently begotten judgment because this matter does not only concern the Twisp Mining & Smelting Company, but it concerns every corporation in States where the Uniform Business Corporation Act is in force and unless this fraudulently begotten judgment is vacated and held for naught it will establish a precedent that will be hard to overcome, if possible to be done, and there cannot be any equities intervened to anyone, because the Chelan Mining Company took with notice and the Receiver cannot claim any and the Methow Gold Corporation did not file the lease (Exhibit #12) or the assignment of same (Exhibit #15) until March 8, 1939, and the lis pendens was filed on February 23, 1939 (St. 138, 139), (St. 157)

Appellant therefore respectfully submits that in the event that this Supreme Court of the United States takes the position that the Chief Justice of the State Supreme Court improvidently allowed the appeal, that the Supreme Court of the United States should grant appellant a review of this cause on a writ of certiorari pursuant to the provisions of Section 237 (c) of the Judicial Code of the United States and grant the appellant the relief prayed for in accordance with the law of the land.

LUCIUS G. NASH,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 866

TWISP MINING & SMELTING COMPANY,
A Corporation,
Appellant,

vs.

CHELAN MINING COMPANY, A Corporation; SEATTLE-FIRST NATIONAL BANK, Acting Through Its SPOKANE & EASTERN BRANCH, as Receiver of the Alder Group Mining & Smelting Company, a Defunct Corporation; and METHOW GOLD CORPORATION, a Corporation,
Appellees.

APPELLANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A WRIT OF CERTIORARI

Lucius G. Nash,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 866

TWISP MINING & SMELTING COMPANY, A CORPORATION,

Appellant,

vs.

CHELAN MINING COMPANY, A CORPORATION; SEATTLE-FIRST NATIONAL BANK, ACTING THROUGH ITS SPOKANE & EASTERN BRANCH, AS RECEIVER OF THE ALDER GROUP MINING & SMELTING COMPANY, A DEFUNCT CORPORATION; AND METHOW GOLD CORPORATION, A CORPORATION,

Appellees.

MOTION

Comes now the Appellant, Twisp Mining & Smelting Company, out of abundance of caution, under the provisions of Section 237 (c) of the Judicial Code of the United States and moves this Honorable Court in the event that this Honorable Court takes the position that the appellant's appeal was improvidently allowed by the Chief Justice of the State Supreme Court on November 20, 1944, to treat the papers whereon the appeal was allowed by the State Supreme Court as a petition for certiorari and as if presented to this Court at the time they were presented to the

judge who allowed the appeal on the grounds and for the following reasons, to-wit:

The Foregoing Motion is based on the grounds that the Judgment and Decree of the Superior Court of Okanogan County, State of Washington and the affirmance thereof by the State Supreme Court was the result of a deliberately planned and carefully executed scheme to defaud the Trial Court and the State Supreme Court by the knowing use of perjured testimony and fraudulent representations to fraudulently obstruct and defeat the due administration of justice in the manner indisputably shown in the Motion herein which involves far more than an injury to a single litigant, for it was the perpetration of a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated with the good of society.

Section 237(c) of Judicial Code of the United States provides:

> "If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted upon as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed."

In *Longest* v. *Lanford*, 274 U. S. 499, 71 Law Ed. 1170, this Court stated the law governing the above statute, as follows:

> "The writ obviously was improvidently allowed. This case falls within the class where a review in this Court may be had only on petition for certiorari under section 237 (b) of the Judicial Code. The distinction is important, has a real purpose and should be given effect by all who are invested with authority to allow writs of

error running from this court to a state court. A failure to observe it may subject the party suing out the writ to damages and double costs (Rev. Stat. Sec. 1010; Judicial Code, Sec. 237 (c); U. S. Code, Title w8, section 344) and result in harm embarrassmenr to the other party. Of course where the writ is improvidently allowed the other party may move in this court to dismiss it. But in actual practice this does not operate as an adequate corrective, for the action of the judge in allowing the weit usually is assumed to be advisely taken. In the present case the fact that the allowance was improvidently escaped the notice of the parties for a full year. While we cannot take jurisdiction on the writ of error so improvidently allowed, we can, under section 237 (c) of the Judicial Code, treat the papers whereon the writ was allowed as a petition for certiorari and as if presented to this Court at the time they were presented to the judge who allowed the writ. The papers have been examined under that section; and we are of the opinion that, treating them as a petition for certiorari, they disclose a case and situation in which the petition should be granted. Writ of error as such dismissed, but as petition for certiorari granted."

This Court on similiar cases in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 88 U. S. Law Ed. Advance Opinions 936, and *Shawkee Mfg. Co.* v. *Hartford-Empire Co.*, 88 U. S. Law Ed. Advance Opinions, 954, granted reviews on Writs of Certiorari and it would seem that this Court should grant the present motion in the event that the Court deems the appeal was improvidently allowed and protect and safeguard the public from a repetition of such actions that are disclosed in this instant case for these appellees are faced with the rule of law their acts cannot be tolerated consistently with the good order of society.

In *Roach* v. *McDonald*, 275 U. S. 449, 72 L. Ed. 365, there was a judgment entered in the Superior Court of Spokane County, State of Washington in favor of Mr. Roach, and the

laws of the State of Washington, under Sections 459 and 460, provided that such judgment could not be collected unless the collection was completed within six years from the date of the judgment; Mr. Roach, however, brought an action on said Judgment in the State of Oregon, and obtained another judgment against McDonald and then came back to Washington and sought to obtain another judgment against McDonald by virtue of the Oregon Judgment and the Washington Court denied Roach any judgment and the State Supreme Court construed sections 459 and 460 of the Washington statutes to provide that Roach could not be granted full faith and credit on his Oregon Judgment and the case was appealed to this Court and this Court denied the Appeal held:

> "This writ of error (or appeal) is dismissed for want of jurisdiction, but since the papers show adequate reason for invoking a review by a petition for writ of certiorari and that will be granted." The U. S. Supreme Court reversed the State Supreme Court in this case.

Appellant respectfully submits that in the event that this Supreme Court of the United States takes the position that the Chief Justice of the State Supreme Court improvidently allowed the appeal, that the Supreme Court of the United States should grant appellant a review of this cause on a writ of certiorari pursuant to the provisions of Section 237 (c) of the Judicial Code of the United States and grant the appellant the relief prayed for in accordance with the law of the land.

LUCIUS G. NASH,
Attorney for Appellant.